

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
NATIONWIDE PROGRAMMATIC )  
AGREEMENT REGARDING THE ) WT Docket No. 03-128  
SECTION 106 NATIONAL HISTORIC )  
PRESERVATION ACT REVIEW PROCESS )

To: The Commission

REPLY COMMENTS OF FORDHAM UNIVERSITY

**SUMMARY**

Fordham University's Reply Comments endorse the proposals to limit Section 106 reviews to properties which are listed in the National Register or have applied for listing; to limit the APE for visual effects to the boundaries of the Historic Property; and to consider only those visual effects which also alter a physical feature of the Historic Property underlying its listing. Fordham also endorses the suggestions that Section XI. public comments should be filed within 30 days of public notice of an Undertaking under Section V., that the Section V.F. Council election to participate should be exercised at the outset; that the 60 day limitation of Section VII.A.4. on applicant resubmission of returned submission packets should be deleted; that the 30 day limit on SHPO responses in Section VII.A.2. should apply to all consulting parties; and that Section

VII.D.1.-5. should place a three month limit on efforts to agree on mitigation measures and enter into an MOA, after which the matter will be resolved by the Commission, which should also be subject to a time limit on this and all matters before it.

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Fordham University's Comments in this proceeding were based upon its own experience with the Section 106 process for review of visual impact objections. While that still pending nine year old proceeding, engendered by a neighbour's aesthetic objection to Fordham's new tower on its own campus, has perforce made the University an expert on what is wrong with the present process, virtually all other commenting parties have substantially broader experience with Section 106 cases and many have been involved in the effort that gave rise to the Draft Agreement. For these reasons, Fordham has studied all of the Comments with great care and has concluded that in some respects the proposals of other parties reflect simpler and more effective ways of dealing with visual impact. This Reply addresses those matters.

## IDENTIFICATION OF ELIGIBLE PROPERTIES

Fordham was one of many commenting parties objecting to the Draft Agreement's requirement that applicants identify "eligible" historic properties which are not on the National Register and have not applied for listing. Fordham suggested that such properties should be identified by the relevant SHPO in its response to the submission packet. Upon review of the Comments, however, Fordham is persuaded that there is no legal warrant under NHPA to extend Section 106 review to properties which have not been determined eligible by the Secretary of the Interior. The matter is explicated in the Comments of the American Tower Corporation (page 17), the State of Maryland (paragraph 6), AT&T Wireless Services (page 15), the National Association of Broadcasters (page 11&n.23), and PCIA (pages 42-43).<sup>1</sup> The Comments of these parties demonstrate that the legislative history of NHPA and the analogous provisions of NEPA dictate limiting the review process to properties which are listed or have applied for listing on the National Register.

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<sup>1</sup> The New Hampshire Division of Historic Resources also tacitly recognizes the problem posed by the Draft Agreement in suggesting that disagreements about the eligibility of unlisted properties must be resolved not by the Commission but by the Secretary of the Interior. Whatever the faults of the Draft Agreement in this respect, however, it recognizes that the Section 106 process deals with facts on the ground and is not another way of registering historic properties. Bringing the Secretary of the Interior into the process at this stage is manifestly inappropriate.

### DEFINING THE APE FOR VISUAL EFFECTS

Fordham's Comments did not address the problem of defining the APE for visual effects beyond noting that the APE proposed in the Draft Agreement is unrealistically large, especially for urban areas. A number of other parties did consider the question, however, and Fordham is persuaded that the NAB is correct to be concerned (Comments, page 12) that the APE as proposed bids fair to become the "area of presumed adverse effect." In divorcing the APE from the physical characteristics of historic properties and defining it instead by the presumed visibility of towers based upon their height and distance from the historic property, the Draft Agreement itself essentially equates visibility with adverse effect.

Such an approach is antithetical to the whole concept of the National Register listing system. Only two characteristics of National Register eligibility are capable of alteration by visual effects: a property's historic "integrity" as reflected in the physical features of "feeling" and "setting". While "evaluation of integrity is sometimes a subjective judgment", the National Register advises that "it must always be grounded in an understanding of a property's physical features and how they relate to its significance." *National Register Bulletin 15*, page 44. The

Register defines feeling (*ibid.*, at 45) as "a property's expression of the aesthetic or historic sense of a particular period of time. It results from the presence of physical features that, taken together, convey the property's historic character." Setting is defined (*id.*) as "the physical environment of a historic property." The boundary of both elements is the boundary of the property's historic features as reflected in its nominating papers. It does not include, as present practice would suggest and the Draft Agreement similarly implies, the viewscape *from* the historic property. If, then, the qualifying characteristics are limited by the historic property's boundaries, so too must be the relevant effects.

Several parties have suggested a means of defining the APE which recognizes this fact: making the APE essentially coextensive with the historic property's boundary of historic significance. See, e.g., Comments of AT&T Wireless Services, Inc., pages 10-14; Western Wireless Corporation and T-Mobile USA, Inc., pages 15-16; PCIA, pages 40-41. The Comments of AT&T Wireless (at page 14) offer the following proposed revision of Section VI.B.2.a, which Fordham endorses as a realistic and comprehensible definition grounded in the governing rules of the Council and the National Register's guidelines:

a. To be considered under Section 106 and this agreement, visual effects from a tower must alter one or more of the physical characteristics of a Historic Property that qualify that property for the National Register. Mere visibility of a Tower or Facility, without alteration of a qualifying characteristic of a historic property, cannot be an effect or an adverse effect under Section 106. Ordinarily, for example, to alter a characteristic of integrity of a historic property, such as its setting, a tower would have to be located on or within a property's boundary of historic significance. As another example, to alter a historic property's integrity of feeling, the tower or antenna would have to prevent or inhibit the physical features of that property from expressing or conveying a sense of a particular period of time. Accordingly, visual effects from a tower or antenna will only be considered under Section 106 when the physical footprint or area of ground disturbance of the project is on or in the boundary of a historic property, or where the Facility is so situated next to a historic property that it substantially prevents or inhibits that property from conveying a sense of a particular time and place, when such feeling is a characteristic of the property's eligibility for the National Register.

Fordham is convinced by its own experience that only by thus anchoring the APE can the Section 106 process remain "centered on historic preservation and not aesthetics," Comments of Western Wireless Corporation and T-Mobile USA, Inc., page 16. As several parties have noted, the vast majority of tower reviews end with findings of no effect or no adverse effect: indeed the Ohio SHPO reported in 2002 that 97% of that state's Section 106 reviews ended in findings of no effect and other SHPO's have had similar experience. See PCIA Comments, page 32 and footnote 67; AT&T Wireless Services, Inc. Comments, page 7 and footnote 4.

Given this fact and the further fact that most SHPO adverse effect findings are purely visual rather than physical (Comments of Western Wireless Corporation and T-

Mobile USA, Inc., page 12), it would appear to be a wholly unjustifiable waste of both public and private resources, as well as a major unnecessary delay in the institution of new telecommunications services, to define the APE for visual effects to encourage rather than stringently limit the availability of Section 106 review in such cases. Nor, as a practical matter, is there any analytical basis for evaluating objections tied to the non-physical effects of an Undertaking. This lack of a decisional framework for taste based objections is probably partially responsible for the fact that Fordham's own Section 106 review, based entirely on an aesthetic objection, remains uncompleted after nine years.

#### **ASSESSMENT OF VISUAL EFFECTS**

Fordham's Comments addressed the fact that the examples of visual impact in Section VI.E.3 could effectively undermine the substantive provisions of the section. Other parties have suggested leaving the examples but revising the section to make clear the fact that visual effects on the viewer, however real they may be as a matter of taste or aesthetics, are not Section 106 effects unless they also alter a physical feature of the historic property underlying its listing. See, e.g., Comments of American Tower Corporation, pages 16-17; Western Wireless Corporation and



T-Mobile Systems USA, Inc., pages 14-15; NAB, page 12.

This more direct approach seems sounder. PCIA's suggested revision of Section VI.E.3.(quoted at page A-20, note 13 of the NPRM), best addresses the problem, if references to "eligible" properties are deleted. The revision would then read:

An Undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish one or more of the characteristics qualifying the property for inclusion in the National Register. Construction of a Facility will not cause a visual adverse effect except where the Facility noticeably diminishes the visual elements of setting, feeling or association within the boundary of a Historic Property, where such elements are important elements of that historic property's eligibility. Examples include Facilities located within the actual boundary of: (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape.

Constraining analysis to physical alterations does not eliminate the purely aesthetic from consideration in the tower construction process; it simply leaves such matters to the state and local land use and zoning authorities who are both equipped to resolve them and aware of and responsive to community tastes and preferences.<sup>2</sup> The fact that such effects are sometimes important in their effect on a viewer's perception does not, as PCIA notes (Comments, page

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<sup>2</sup> The Comments of AT&T Wireless Services, Inc. (page 7, n.8) point out that it has been Commission policy thus to defer on aesthetic questions, quoting the Commission's Report and Order in *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, 60 R.R.2d 13, at para. 17 (1986), in which the Commission said: "We would also note that aesthetic concerns may more appropriately be resolved by local, state, regional or local [sic] land use authorities. Those authorities can better handle questions given their experience and familiarity with land use values."

35, footnote 72) change the fact that they are not Section 106 effects unless they also alter a physical feature of the historic property.

#### **MISCELLANEOUS PROVISIONS**

Section XI of the Draft Agreement allows any member of the public to notify the Commission of its concerns about a "covered or excluded" Undertaking, and provides that the Commission will consult the SHPO/THPO, potentially affected tribes and NHO's or the Council, and take appropriate action. No timelines are given for any part of this process. Fordham urges adoption of the suggestion of Cingular Wireless (Comments, page 16) that the phrase "or excluded" should be deleted and that the time for such notification should be specified as within 30 days of initial public notice by the applicant under Section V. Entertainment of such objections to Undertakings not covered by the Agreement would appear to nullify all the constraints so carefully worked out for identification of Undertakings requiring review and set up a parallel process for consideration of otherwise non-cognizable objections. And, as Cingular notes, the absence of a time limit on entry of such public filings opens an Undertaking to eleventh hour (or even post-decision) objections which should have been brought forward at the outset.

Section V.F. of the Draft Agreement provides that the Council may enter the Section 106 process by invitation or on its own initiative. The State of Maryland suggests (Comments, paragraph 6) that the Council should be required to decide at the outset of the process whether it wishes to participate. Fordham endorses this suggestion, which contributes to clarity and efficiency in the review process and avoids the potential for delays engendered by late Council entry into a review.

Section VII.A.4. of the Draft Agreement provides that if the SHPO returns a submission packet as inadequate, the applicant has 60 days to resubmit. The time limit for resubmission should be deleted. As the American Cultural Resources Association asks (Comments, page 3, Comment 18): "What is the purpose of a deadline"? Western Wireless Corporation and T-Mobile USA, Inc. note (Comments, page 17) that the question whether to go forward is for the applicant to answer and only the applicant is hurt by delay. And, as PCIA observes (Comments, page 51), expedition is in the applicant's best interest, so there is no need for a time limit. Moreover, the entire review process is better served by a thorough than a speedy resubmission.

Section VII.A.2. gives a SHPO 30 days to respond to a submission packet. PCIA suggests (NPRM, page A-20, n.14;

Comments, page 51) that the same 30 day response period should apply to all consulting parties upon whom the submission packet materials are served, as currently provided under 36 C.F.R. § 800.5(c)(2)(i). Fordham believes the suggested revision would be a wise one. The absence of any time structure encourages consulting parties to defer their consideration of a proposal to a later stage. Requiring their early response not only contributes to efficiency and expedition, but could also materially assist applicants in preparing their materials for resubmission. The most complete record at the earliest possible time also gives the Commission the best possible basis for resolving any interlocutory disputes that may be brought before it.

PCIA suggests (Comments, page 52) that Section VII.D.1.-5. should include a time limit for applicants and consulting parties to agree on mitigation measures for adverse effects and enter into an MOA. It proposes a three month period for completion of this process with the matter forwarded to the Commission for resolution if no MOA is entered into. Fordham University is the continuing victim of such consultation delay and strongly endorses this suggestion. As noted in Fordham's initial Comments, delay is often an effective weapon against an Undertaking and even when it is simply the result of administrative overload,

the effect on applicants is the same. As also urged in those Comments, however, the imposition of time limits on all other parties to the Section 106 process cannot ensure expeditious completion of reviews unless the Commission itself is subject to time limits under all provisions which require agency action.

Respectfully submitted,

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